In the Supreme Court of the United States,

OCTOBER TERM, 1923.

Office Supreme Court
FILED
FEB 28 192
WM. R. STANS
CL

NO. [redacted]71

SOUTHERN RAILWAY COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY AND SEABOARD AIR LINE RAILWAY COMPANY, Appellants,

vs.

CITY OF DURHAM, Appellee.

IN ERROR TO THE SUPREME COURT OF NORTH CAROLINA.

BRIEF ON BEHALF OF APPELLANTS.

W. B. GUTHRIE,
THEODORE W. REATH,
Of Counsel for Norfolk and Western Railway Company, Appellant.

FULLER & FULLER,
JAMES F. WRIGHT,
Of Counsel for Seaboard Air Line Railway Company, Appellant.

MANLY, HENDREN & WOMBLE,
L. E. JEFFRIES,
Of Counsel for Southern Railway Company, Appellant.

INDEX.

	PAGE
I. STATEMENT OF FACTS	1
II. ASSIGNMENT OF ERRORS	4
III. ARGUMENT	8
1. The ordinance is arbitrary and not due process of law required by the Fourteenth Amendment of the Constitution of the United States	9
2. The ordinance is void as in violation of the Commerce Clause of the Constitution of the United States, Article I, Section 8, paragraph 3	26
3. The ordinance is void for that compliance would not be efficient and economical management and reasonable expenditure for structures by the carrier as required by subdivision 2, Section 15a, of the Interstate Commerce Act as amended by the Transportation Act	31

INDEX OF CASES CITED.

CASE:	Report	Page	Page of Brief
A. C. Y. Ry. *vs.* U. S. (New England Divisions Case)	261 U. S.	184	37
C. B. & Q. R. Co. *vs.* R. R. Commission of Wisconsin	237 U. S.	220	29
C. M. & St. P. Ry. Co. *vs.* Minneapolis	238 Fed.	384	11
City of Durham *vs.* Sou. Ry. Co.	117 S.E.	17	20

CASE:	Report		Page	Page of Brief
City of Indianapolis *vs.* Indianapolis U. Ry. Co.	168 Ind. 66 N. E.		45 163	12
City of Owatonna *vs.* C. R. I. & P. Ry. Co.	195	N. W.	452	14
Davis *vs.* Wechsler	263	U. S.	22	18
Dayton-Goose Creek R. R. Co. *vs.* I. C. C.	Decided Jan. 7, 1924 (Not yet reported.)			37
Erie R. R. *vs.* Public Utility Commissioners	254	U. S.	394	9 34
Herndon *vs.* C. R. I. & P. R. R.	218	U. S.	135	29
Houston & Texas Cent. R. R. Co. *vs.* Mayes.	201	U. S.	321	27
I. C. C. *Ex Parte* 74	58 I. C. C. 68 I. C. C.		220 676	34
I. C. C. *vs.* Goodrich	224	U. S.	194	36
Indianapolis *vs.* Indianapolis Union Ry. Co.	160 Ind. 66 N. E.		45 163	12
Kansas City Southern Ry. Co. *vs.* Kaw Valley Drainage District	233	U. S.	75	30
Miss. R. R. Comm. *vs.* Mobile & Ohio R. R. Co.	244	U. S.	388	15
Mo. Pac. R. Co. *vs.* Nebraska	217	U. S.	196	10
New England Divisions Case (A. C. Y. Ry. *vs.* U. S.	261	U. S.	184	37

CASE:	Report	Page	Page of Brief
Ohio Valley Water Company *vs.* Ben Avon Borough	253 U. S.	287	24
R. R. Comm. of Wisconsin *vs.* C. B. & Q. R. Co.	257 U. S.	563	35
Seaboard Air Line R. Co. *vs.* Blackwell	244 U. S.	310	28
State *Ex Rel*, City of Indianapolis *vs.* Indianapolis' Union Ry. Co.	160 Ind. 66 N. E.	45) 163)	12
St. Louis & S. F. Ry. Co. *vs.* Public Service Commission of Missouri	254 U. S.	535	29
Washington *Ex Rel*, Oregon R. R. & Nav. Co. *vs.* Fairchild, *et al.* Commissioners	224 U. S.	510	10
Wisconsin Rate Case (R. R. Com. of Wisconsin *vs.* C. B. & Q. R. Co.	257 U. S.	563	35

STATUTES CITED.

Art. 1, Sec. 8, Paragraph 3, Const. of U. S. 7

Fourteenth Amendment 9

Report Senate Committee on Railroads, No. 304 Government control of Railroads 34

Sec. 15a (2), 20a etc., Act to Regulate Commerce as amended by Transportation Act. 33, 35

In the Supreme Court of the United States.

No. 339 of October Term, 1923.

Southern Railway Company, Norfolk and Western Railway Company, and Seaboard Air Line Railway Company, Appellants,

vs.

City of Durham, Appellee.

In Error to the Supreme Court of North Carolina.

BRIEF ON BEHALF OF THE APPELLANTS.

I.

STATEMENT OF FACTS.

This proceeding was instituted in the Superior Court of Durham County, North Carolina, by the City of Durham for a mandamus to enforce an

ordinance requiring the three railroad companies to eliminate the grade crossing of Chapel Hill Street over the tracks of the railways in the City of Durham, North Carolina, by constructing an under-pass, below the tracks, for the highway. The three defendants are steam railroad systems engaged in interstate commerce. The tracks crossing Chapel Hill Street are part of their interstate railroad systems. The Norfolk and Western Railway Company filed an answer making the defense that an overhead bridge would be the appropriate remedy and that "before the ordinance was passed" (Transcript, page 28), that Company submitted plans and detailed specifications (Exhibit 1, Blueprint numbered 10769 c with Answer N. & W. Ry., following Transcript, page 54) and "made proposal of a plan for an overhead structure which would have carried the highway over the tracks of the three railways." The Southern and Seaboard in their answers make specific denials of evidentiary fact set forth in the complaint and set up that an overhead bridge would be an equally effectual solution of the problem of grade separation with the proposed under-pass and would not be wasteful and uneconomic. The first cost of the overhead structure would be, as disclosed by the answers, $160,000.00 as contrasted with $258,800.00 for the under-pass. Circumstances of fact are also detailed in the

answers showing the other advantages of convenience and safety which the overhead structure would have had as contrasted with the under-pass required by the ordinance.

In addition to other defenses the answers raise by specific averment these three Federal defenses:

First.—The ordinance in requiring the construction of an under-pass is arbitrary and unreasonable and not due process of law required by the Fourteenth Amendment of the Constitution of the United States;

Second.—The ordinance is an unreasonable imposition and restraint upon interstate commerce inhibited by Article 1, Section 8, paragraph 3, of the Constitution of the United States;

Third.—The ordinance in requiring an under-pass is void for that compliance therewith will not be efficient and economical management and reasonable expenditure for structures required by sub-division 2, Section 15a, of the Act of Congress known as the Act to Regulate Commerce, which section was added to that Act by one of the amendments of the Transportation Act of 28 February, 1920.

The Superior Court held as matter of law that the answers raised no issues of fact and if true,

did not state defenses. A trial on the issues of fact was denied.

A writ of alternative mandamus was awarded to the City and on appeal of the Railways to the Supreme Court of North Carolina the judgment was affirmed. From this final judgment of the Supreme Court of North Carolina a writ of error was allowed to the Supreme Court of the United States.

II.

ASSIGNMENT OF ERRORS.

First.—The North Carolina Supreme Court erred in affirming the judgment of the Superior Court of Durham County, North Carolina, entered September 16, 1922, which had upheld the ordinance of the City of Durham of the 20th of March, 1922, granting mandamus to compel these Petitioners to construct and maintain an underpass across their tracks at Chapel Hill Street crossing in the City of Durham, North Carolina.

Second.—The North Carolina Supreme Court erred in holding by its judgment of April 4, 1923, as a matter of law and without evidence, that the facts set up in the answers of the three Petitioners did not constitute a defense by the averments that the under-pass required by the ordinance was an unreasonable requirement so op-

pressive and arbitrary as to deprive defendants of their property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

Third.—The North Carolina Supreme Court erred in holding that the said ordinance of the City of Durham upheld by the judgment of the Superior Court was not, under the facts set up in the answers of petitioners, arbitrary and unreasonable as a restraint upon interstate commerce inhibited by Article I, Section 8, paragraph 3 of the Constitution of the United States.

Fourth.—The North Carolina Supreme Court erred in holding by its judgment of April 4, 1923, as a matter of law and without evidence, that the following facts set up in the answers of the three petitioners, viz., that proposal was made to afford the relief by the construction of an overhead structure at a cost of approximately one hundred thousand dollars less than the cost of the underpass required by the ordinance and that the overhead structure would cause the minimum property damage and eliminate serious drainage difficulties and would provide a safer highway than the viaduct directed to be constructed by the said ordinance,—did not constitute a defense to the requirement of an under-

pass by the ordinance of the City of Durham, in that compliance with said ordinance was unreasonable and not efficient, economical management and not such a reasonable expenditure as required by Section 15a, sub-division 2 of the Act of Congress known as the Act to Regulate Commerce, as amended by the Transportation Act of February 28, 1920.

Fifth.—The Supreme Court of North Carolina erred in holding that no "issue of fact" was raised by the averments in the answer of petitioners that the action of the City of Durham in passing the ordinance was arbitrary, unreasonable, and oppressive, in that a bridge offered to be constructed affording relief from the danger could be constructed for the sum of one hundred thousand dollars less than the under-pass and that said proposed overhead bridge would be safer, avoid drainage difficulties, and do less property damage; and by this holding the Supreme Court of North Carolina deprived defendants of the defense plead that said ordinance was so arbitrary, unreasonable, and oppressive as to deprive it of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

Sixth.—The North Carolina Supreme Court erred in declining to hold, as contended for by

the petitioners, that the ordinance is void for that compliance with the same would not be that efficient and economical management and reasonable expenditure for structures by the carriers as required by sub-division 2, Section 15a, of the Interstate Commerce Act, as amended by the Transportation Act, and holding that nothing in the Transportation Act contravened the right of the State to legislate in the interest of public safety under the facts shown in the pleadings herein and in the manner set forth in the said ordinance of the City of Durham.

Seventh.—The North Carolina Supreme Court erred in affirming the judgment of the Superior Court which had found "from the pleadings" that said under-pass required by said ordinance was reasonable; this finding being in disregard of the uncontradicted facts set forth in the answers which establish the conclusion of law that an overhead bridge would have been reasonable and that the said under-pass was unreasonable in violation of the Commerce Clause of the Constitution of the United States, Article I, Section 8, paragraph 3.

Eighth.—The North Carolina Supreme Court erred in affirming the judgment of the Superior Court which had found "from the pleadings"

that said under-pass required by said ordinance was reasonable; this finding being in disregard of the uncontradicted facts set forth in the answers which establish the conclusion of law that the under-pass was inefficient and uneconomic management and an unreasonable expenditure for structures in violation of Section 15a, subdivision 2, of the Act of Congress known as the Act to Regulate Commerce.

Ninth.—The North Carolina Supreme Court erred in affirming the judgment of the Superior Court which had found "from the pleadings" that said under-pass required by said ordinance was reasonable; this finding being in disregard of the uncontradicted facts set forth in the answers which establish the conclusion of law that the under-pass was arbitrary and unreasonable and not due process of law required by the Fourteenth Amendment of the Constitution of the United States.

III

ARGUMENT.

The nine assignments of error raise three Federal questions which we shall group and present under three heads:—

1. The Ordinance is arbitrary and not due process of law required by the Fourteenth Amendment of the Constitution of the United States.

The Superior Court and on error the Supreme Court of North Carolina in refusing a jury trial and granting a mandamus held that taken as true the answers raised no issues of fact and stated no defense. A motion was made by the Railways and denied by the trial Court to transfer the case to the civil docket for trial by jury. The Supreme Court of North Carolina affirmed the denial of this motion, holding that no issue of fact was tendered by the answers "because they qualified their admission of the truth of the averment in paragraph 4 as to the volume of the traffic over this grade crossing," thus disregarding the three federal issues tendered by the answers. The Railways did not assert from the Federal viewpoint (leaving out of consideration for the moment the contention that the Transportation Act had prescribed the rule to be followed in making such expenditures) that the council of the City of Durham lacked power to pass an ordinance *reasonably* calculated to promote public safety by requiring the separation of grades at a dangerous crossing: Erie Railroad *vs.* Public Utility Commissioners, 254 U. S. 394. Nor are we urging under this head that mere expense

is the limit of the police power. The point we do make under this first head is that, taking the answers as true, the under-pass required by the ordinance is *unreasonable* and not that due process of law imposed upon every exercise of State authority by the Fourteenth Amendment of the Federal Constitution. Suppose the ordinance had required a marble structure unrelated to any useful purpose? The difference between this extravagant illustration and the thing which has been done is a matter of degree only. The Fourteenth Amendment was contrived to prevent such arbitrary action.

In Missouri Pacific Ry. Co. *vs.* Nebraska, 217 U. S. 196, the Court considered a Nebraska Statute which required railroads to construct side-tracks or switches to reach grain elevators erected adjacent to the right of way. In holding the Statute void as taking the property of the Railway Company without due process of law, the Court said that if the statute (page 207)

> "requires a side track only when the demand is reasonable, then the railroad ought, at least, to be allowed a hearing in advance to decide whether the demand is within the act."

In Washington, *ex rel,* Oregon Railroad & Navigation Company *vs.* Fairchild *et al.,* Commissioners, 224 U. S. 510, a Railroad Commission, after hearing, had ordered a switch connec-

tion to be constructed between two trunk lines of railroad. There was no evidence that business was offering which would justify the track. In holding the Commission's order invalid the Court thus set the mark of the kind of hearing which must be had in order to satisfy the requirement of due process (page 525):—

> "The carrier must have the right to secure and present evidence material to the issue under investigation. It must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen, but to give legal effect to what has been established."

A constitutional hearing was denied in the case at bar.

A case interposing the due process clause as a defense to a municipal ordinance requiring the lowering of railway tracks to avoid grade crossings is C. M. & St. P. Ry. Co. *vs.* Minneapolis, 238 Fed. 384 (District Court, Minnesota, August 15, 1916). There, an ordinance required the Railway Company to depress its tracks in order to avoid crossing streets at grade. In a suit to restrain the enforcement of the ordinance, the Court held the evidence (Syl. 8, page 385)

> "to show that the provision, requiring the depression of the tracks a second time after

> they had reached the natural level at the railroad yards, in order to pass under one street, was unnecessary, unreasonable, and arbitrary to such an extent as to deprive the railroad company and an industrial plant having trackage connections therewith of their property without due process of law."

The Court added that such an ordinance is always open to this inquiry (page 399):—

> "Is it unnecessary or unreasonable or arbitrary to such an extent that it can fairly be said that its enforcement will have the effect of depriving the complaining parties of their property without due process of law?"

An illustrative state case is State *ex rel* City of Indianapolis *vs.* Indianapolis Union Ry. Co., 160 Indiana 45 (1903), 66 N. E. 163. The Railway filed a demurrer to an alternative writ of mandamus. The City had passed an ordinance declaring all grade crossings within the city limits nuisances, requiring their abatement to secure the safety of citizens and requiring the railroads to separate the grades and raise or lower their tracks to conform to any grade that might be established. The Court held that the power of the City to pass such an ordinance did not extend to a requirement that all the railroads within the corporate limits should construct elevated

tracks over all crossings without regard to the conditions or circumstances of any particular crossing. The lower Court had sustained the demurrer to the prayer for the writ of alternative mandamus and in affirming this decision the Supreme Court said (page 168):—

> "The power of relator may be conceded, arguendo, either under its charter law or under clause 5 of section 5153, Burns' Rev. St., *supra,* where any particular railroad crossing over its public streets by reason of the peculiar or particular circumstances or conditions thereof can only be made safe for public travel thereover by elevating the tracks of the road, to compel the railroad company to discharge such duty or obligation. But certainly such authority under the existing laws cannot be extended by construction so as to warrant the relator in coercing appellee to construct and maintain a system of elevated tracks for all of its various roads running into and through the city of Indianapolis. The ultimatum presented to appellee by the ordinance in question was to remove the surface tracks of its roads and construct and maintain elevated tracks over all of the crossings in the prescribed district, without regard to the conditions or circumstances of any particular crossing."

So the Court decided that the fiat of City Councils that all grade crossings were nuisances

could not substitute a showing of the facts as to each crossing, the hazard, use of the highway, etc. Hence the ordinance was declared arbitrary and void.

The principle applied by the Indiana Supreme Court is applicable to the case at bar because the facts stated in the answers and admitted by the judgment of the Superior Court refusing trial and granting the writ affirmatively disclose that the under-pass for the highway ordered in the City ordinance of Durham was wasteful in point of expenditure, not effective on account of bad drainage and less safe and convenient than the overhead bridge.

Another State case strikingly illustrates the error committed by the North Carolina courts in the case at bar in giving conclusive weight to the ordinance against the better way set forth in the answer of the railroads. The case is City of Owatonna *vs.* Chicago, Rock Island and Pac. Ry. Co. (Minn., Oct. 19, 1923), 195 N. W. 452. There the city sued out an alternative writ of mandamus, requiring defendant railway to install crossing gates where its tracks crossed two streets of the city at grade and provide operators at all times to attend to and operate these gates. The answer of the Railway asserted

> "that the ordinance is arbitrary, oppressive and unreasonable, especially that portion of

> it requiring defendant to provide operators at all times to attend to and operate the gates, and that compelling defendant to install such gates and provide such operators will deprive it of its property without due process of law."

In answer the Railway further

> "offered to install electric flash light signals at these crossings and keep them in operation both day and night, or to maintain flagmen at such crossings at all reasonable hours. It alleged that experience had demonstrated that such signals were more effective than gates in preventing accidents, and that they could be installed, maintained and operated for a small part of the expense of installing, maintaining and operating gates."

These averments in the answer were stricken out by the trial Court and on error to the Supreme Court of Minnesota this judgment was reversed. The Supreme Court said:—

> "Defendant should be permitted to prove, if it can, that the safety devices which it offered to provide are more efficient than gates in protecting the traveling public; that safety devices equally as effective as gates can be provided and maintained at much less expense."

In Mississippi Railroad Commission *vs.* Mobile & Ohio Railroad Company, 244 U. S. 388,

the Commission had made orders requiring the railroad company to restore to service six passenger trains that had been suspended, two each way daily between Meridian and Waynesboro and one each way daily between Meridian and Okolona, these towns being in the State of Mississippi. The trains between Meridian and Okolona were interstate and the others local. At the time of the discontinuance of certain of the trains, other trains previously faster had been changed so as to stop more frequently. In holding these six orders of the Commission void as not due process of law the Court said (pages 395-6):—

> "Thus summarized this evidence shows that the plaintiff railroad company, an important interstate carrier, was operating before the business depression incident to the war on a margin so narrow that the $85,000 of profit for the entire preceding year would have been more than swallowed up in nine days by the shrinkage of business of the company as it was when this controversy arose; that without being able to meet its growing deficit the company had resorted to rigid economies of every sort before it discontinued these six trains the continued operation of which would have involved a loss of $10,000 a month; that the three daily trains each way to the north of Meridian which remained after the taking off of the trains which gave

rise to the controversy cannot be said to be inadequate to the needs of the comparatively small population to be served, and that while the service to the south of Meridian—with but two trains each way in twenty-four hours, and these running at hours inconvenient for the transaction of business—cannot be thought a liberal service, yet these orders were intended by the commission to be in effect one order for the restoration of the six trains, they were thus treated in the court below and must be so treated here. Looking to the extent and productiveness of the business of the company as a whole, the small traveling population to be served, the character and large expense of the service required by this order, and to the serious financial conditions confronting the carrier, with the public loss and inconvenience which its financial failure would entail, we fully agree with the District Court in concluding that the order of the commission at the time and under the circumstances when it was issued was arbitrary and unreasonable and in excess of the lawful powers of the commission, and that if enforced it would result in such depriving of the railroad company of its property without due process of law as is forbidden by the Fourteenth Amendment to the Constitution of the United States."

The answers set out the facts in detail showing that the requirement of the underpass was

burdensome, arbitrary, unsafe, inconvenient, unduly expensive and unreasonable. There is no denial in the record of the facts set forth. Indeed, the lower Court, as shown, found the facts "from pleadings." All the facts that were before the lower Court or the Supreme Court are also before this Court. So the statement in the opinion of the Supreme Court of North Carolina (Transcript, page 49) that "the judge was ready to hear and determine the action but the railroads failed to offer testimony or evidence of any kind whatever" must be understood to refer only to the degree or amount of travel and hazard at the crossing. If stretched beyond this it becomes a gratuitous, incorrect statement of the action of the lower court on the Federal issues in finding the facts from the pleadings. The lower court from the pleadings decided as matter of law that the answers stated no defense.

The principle which seems controlling upon this procedural phase of the case was thus expressed by the Court in Davis *vs.* Wechsler, 263 U. S. 22:

> "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. Even if the order went only to the

venue and not to the jurisdiction of the Court, each Director General in turn plainly indicated that he meant to adopt the position of his predecessor, and to insist that the suit was brought in the wrong county. His lawful insistence cannot be evaded by attempting a distinction between his appearance and his substantially contemporaneous adoption of the plea. Indeed when the law requires him to unite his defence on the merits, which imports an appearance *pro hac vice*, with his preliminary plea, it is hard to understand how any effect could be attributed to the statement that he appeared. The state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of federal right. The principle is general and necessary. *Ward* vs. *Love County*, 253 U. S. 17, 22. If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. *Creswill* vs. *Grand Lodge Knights of Pythias*, 225 U. S. 246. This is familiar as to the substantive law and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way."

Is it not an arbitrary exercise of power to compel these defendants to build an underpass at a

cost of $100,000.00 more than the overhead structure when the pleadings establish without contradiction that the overhead bridge will cause the minimum property damage, will furnish a less grade on the approach, will eliminate drainage difficulties which make the underpass objectionable and inherently improper, will enable the Railway Companies to use to the maximum their property by providing for seven tracks which cannot be obtained by an underpass, when the steel girders necessary for the underpass are dangerous to trainmen, and the underpass will necessitate the elevation at great expense of the tracks of one of the defendants and will seriously interfere with the economical performance of switching service? Add to all of these facts set up in the answers and admitted for the purposes of this case, the further fact that an overhead structure will provide "a safer highway on a viaduct" (Tr., p. 29) and we submit that the Court should have concluded that this was an arbitrary exaction.

Perhaps the Supreme Court of North Carolina intends sub-division 7 of the opinion of that Court (117 S. E. 22) as an answer to the defense of lack of due process. In sub-division 7 the Court asserts that "the State in the exercise of the police power may authorize a city to require a railroad company to construct at its own expense such viaducts over its tracks at street cross-

ings as may be necessary for the safety and protection of the public." No one at this day will deny that police power is as thus set forth. But the issue tendered by the answers in this case was whether the power had been exercised reasonably or "was arbitrary and unreasonable," to use the phrase of the Supreme Court of the United States in the Mississippi Railroad Commission case, *supra*. The Supreme Court of North Carolina seems to be asserting that the conceded power of the City to order grades separated is not subject to the limitation of the Fourteenth Amendment.

The clearest way to disclose the confusion of mind and resulting error of the Supreme Court of North Carolina will be by bringing into juxtaposition statements from our opponent's brief in that court with the kindred parts of the Supreme Court's opinion. The brief said at page 5:—

> "The defendants further assert that because they deny that the underpass is an economical way of eliminating the grade crossing, because they assert that the underpass is more expensive than a bridge, that, therefore, the action of the governing authorities of the City of Durham was arbitrary, unreasonable and oppressive. The plaintiff petitioner contends that these defenses raise no issues of fact to be determined and tried by a jury."

and on page 6:—

> "The question whether or not the public safety demanded the elimination of the grade crossing of the street and the railroads was one within the legislative power of the governing authorities of the City of Durham. Their determination of this question is not the subject of review by the Courts. Their decision is conclusive and final upon this question unless it is clearly oppressive and amounts to an abuse of their discretion, that is, is not done in good faith."

And the Supreme Court of North Carolina adopted this view and held that the question of "fraud" and "oppression" was one of law for the Court, saying, (117 S. E. 20):—

> "That the governing body exceeded its powers, or committed fraud and oppression, constituting a manifest abuse of discretion, are questions of law for the court. The burden is upon the defendants to show affirmatively that there was an abuse of discretion and that the ordinance was unreasonable and oppressive. The reasonableness of a city ordinance is a question of law for the court.

So the validity of the ordinance was made to turn on "good faith," "fraud," etc., as matter of law, instead of solely on the unreasonable or

arbitrary nature and effect of the enactment upon the facts in the uncontradicted answers. In short the North Carolina Courts put the validity of the ordinance upon fraud, and the like issues, and did not pass upon the real Federal issues of reasonableness and the like.

From another viewpoint there was no hearing required by due process of law in the Superior or Supreme Court of North Carolina. The opinion of the Supreme Court (Transcript, page 48) states that "the assertion in the answer that the underpass would be more expensive than a bridge" presented "a question *of fact* for the court" (italics ours). On the very next page the opinion states that "the reasonableness of a city ordinance is a question *of law* for the court" (italics ours). How could there be a hearing in view of these contradictory statements, first that one of the important Federal defenses was an issue of fact and later that the issue was one of law? The Superior or Trial Court determined from the pleadings that no defense was stated and granted a writ of mandamus: and the Supreme Court of North Carolina affirmed this judgment in an opinion which, as to one of the important Federal defenses of wasteful expenditure, showed by conflict of statement no understanding consideration of the defense. The truth

is that both courts considered the ordinance conclusive as matter of law and without hearing the evidence even though the evidence might fully establish all the facts set forth in the answers. Here we have a shutting of the mind to the facts and the resultant Federal questions.

This Court recently in Ohio Valley Water Company *vs.* Ben Avon Borough, 253 U. S. 287, considered an order made by the Public Service Commission of Pennsylvania fixing the value of a water company's plant and the revision of this order by the Superior Court of Pennsylvania (an intermediate tribunal) raising the value found by the Commission of $924,744.00 to $1,324,621.80 and authorizing rates sufficient to yield 7 per cent. upon this value as raised. The decision of the Superior Court had been reviewed by the Supreme Court of Pennsylvania, and that Court, after stating that the appeal "involved the question of the fair value, for rate-making purposes, of the property of appellant, and the amount of revenue which appellant was entitled to collect," and after noting that the Superior Court had differed from the Commission as to the proper valuation of the property, then ruled that:—

> "A careful examination of the voluminous record in this case has led us to the conclusion that in the items wherein the Superior Court differed from the commission upon the

question of values, there was merely the substitution of the former's judgment for that of the commission, in determining that the order of the latter was unreasonable."

In reversing the Supreme Court of Pennsylvania for failing to accord a hearing such as the Fourteenth Amendment requires, this Court said at page 289:—

"Looking at the entire opinion we are compelled to conclude that the Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the Commission comes to be considered on appeal. * * *

"In all such cases, if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment. * * *

"Here the insistence is that the Public Service Company Law as construed and applied by the Supreme Court has deprived plaintiff in error of the right to be so heard; and this is true if the appeal therein specifically provided is the only clearly authorized proceeding where the Commission's order may be challenged because confiscatory. Thus

far plaintiff in error has not succeeded in obtaining the review for which the Fourteenth Amendment requires the State to provide."

2. The ordinance is void as in violation of the Commerce Clause of the Constitution of the United States, Article I, Section 8, paragraph 3.

The defense that the ordinance upon the admitted facts stated in the answers constituted an interference with interstate commerce was made by the facts presented in the answers (Transcript, pages 22, 26, 30), and was argued at length in the Superior and Supreme Courts of North Carolina. The Supreme Court, however, (City of Durham *vs.* Southern Railway *et al,* 117 S. E. 17, April 4, 1923) did not in terms pass upon this question or make any expression from which the ground on which that Court overruled this defense can be understood. Accordingly we present here, as in the Supreme Court of North Carolina, our argument without any light from the Supreme Court of North Carolina as to its views on this point.

The States may regulate interstate carriers in respect of matters not essentially national or not already covered by regulation of Congress. Familiar instances of such state regulation will at once occur in the Sunday laws, the Car Stove law, the law requiring examination of enginemen

for color blindness, etc. But the regulation must be reasonable. An illustration of arbitrary regulation and illegal restraint, in a field wherein at the time the case was decided Congress had not acted and the State therefore could legislate, is Houston & Texas Central R. Co. *vs.* Mayes, 201 U. S. 321. The Court considered an Act of the State of Texas applying alike to interstate and intrastate shipments which penalized the failure by a railway company to furnish cars to shipper within a given number of days after requisition and admitted of no excuse except "strikes or other public calamity." The Court pointed out that exigencies of business, weather, or whatnot interfered with transportation and prevented the delivery of cars for loading on a particular day. Accordingly the Court held that the Texas Act was an unconstitutional regulation operating as a restraint upon interstate commerce and said (page 331):—

> "While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where, by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise, which good management and a desire to fulfill all its legal requirements cannot provide for, and against which the statute in question makes no allowance."

In Seaboard Air Line Ry. Co. *vs.* Blackwell, 244 U. S. 310, the blow-post law of Georgia requiring railroads to check the speed of trains before reaching public road crossings so as to stop in time if the highway was obstructed was held an interference with interstate commerce as applied to the state of facts specifically pleaded by the defendant interstate carrier in the case. On demurrer to the answer the averments were struck out for which judgment was reversed, the Court saying (page 315)

> "there might be" crossings "so numerous and so near together that to require the slackening of speed would be practically destructive of the successful operation of interstate passenger trains."

Upon the conceded facts this regulation in the case at bar will entail an expenditure for the under-pass of $258,800.00 for the execution of a plan of separating the grades, less safe and desirable from the view-point of the public and the railways than the overhead bridge which would cost $160,000.00.

The cases holding that State Statutes and Commission orders requiring interstate trains to stop at local stations constitute an illegal interference with interstate commerce are also suggestive of the ruling the Supreme Court would make in this

case: Herndon *vs.* C. R. I. & P. R. Co., 218 U. S. 135; C. B. & Q. R. Co. *vs.* Railroad Commission of Wisconsin, 237 U. S. 220; St. Louis & San Francisco Ry. Co. *vs.* Public Service Commission of Missouri, 254 U. S. 535.

In the last case above cited, the Court said:—

> "The applicable general doctrine has been often considered and in Chicago, Burlington & Quincy R. R. Co. *vs.* Wisconsin Railroad Commission, 237 U. S. 220, 226, this Court said:
>
> " 'In reviewing the decision we may start with certain principles as established: (1) It is competent for a State to require adequate local facilities, even to the stoppage of interstate trains or the re-arrangement of their schedules. (2) Such facilities existing—that is, the local conditions being adequately met—the obligation of the railroad is performed, and the stoppage of interstate trains becomes an improper and illegal interference with interstate commerce. (3) And this, whether the interference be directly by the legislature or by its command through the orders of an administrative body. (4) The fact of local facilities this court may determine, such fact being necessarily involved in the determination of the Federal question whether an order concerning an interstate train does or does not directly regulate interstate commerce, by imposing an arbitrary requirement. Gladson *vs.* Minnesota, 166

U. S. 427; Lake Shore R. R. *vs.* Ohio, 173 U. S. 285; Atlantic Coast Line *vs.* Nor. Car. Corp. Comm., 206 U. S. 1; Mo. Pac. Ry. *vs.* Kansas, 216 U. S. 262; Cleveland, etc., Ry. *vs.* Illinois, 177 U. S. 514; Mississippi R. R. Comm. *vs.* Ill. Cent. R. R., 203 U. S. 335; Atlantic Coast Line *vs.* Wharton, 207 U. S. 328.' "

Are not the same limitations on the police power applicable in this case? All that the State or the City is entitled to require is that the local conditions be adequately met. Once they are adequately met, anything which requires an added expenditure of money becomes an improper burden on the interstate carrier.

The case at bar is not different in principal from Kansas City Southern Ry. Co. *vs.* Kaw Valley Drainage District, 233 U. S. 75, wherein petitions for mandamus were filed by the Drainage District, against two railways to require compliance with an order of the Drainage District upon the railways requiring them to raise their bridges over the Kansas river "to specified heights and to remove the old" bridges, which the railroads had refused to do, claiming that the order was an unreasonable restraint on interstate commerce. The Court after pointing out that the existing bridges were a necessary part of lines of commerce by rail among the States and were subject to the exclusive

control of Congress, used this significant language (page 79):—

> "The decisions also show that a state cannot avoid the operation of this rule by simply invoking the convenient apologetics of the police power. It repeatedly has been said or implied that a direct interference with commerce among the states could not be justified in this way. 'The state can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic.' Illinois C. R. Co. *vs.* Illinois, 163 U. S. 142, 154, 41 L. ed. 107, 111, 16 Sup. Ct. Rep. 1096; Austin *vs.* Tennessee, 179 U. S. 343, 349, 45 L. ed. 224, 228, 21 Sup. Ct. Rep. 132; Atlantic Coast Line R. Co. *vs.* Wharton, 207 U. S. 328, 334, 57 L. ed. 230, 234, 28 Sup. Ct. Rep. 121."

3. The ordinance is void for that compliance would not be efficient and economical management and reasonable expenditure for structures by the carrier as required by sub-division 2, Section 15a, of the Interstate Commerce Act as amended by the Transportation Act.

With this defense, that the under-pass would not comply with the Transportation Act, the Supreme Court of North Carolina deals in two different parts of the opinion. The first allusion

(117 S. E. 19) states that "the assertion in the answer that the underpass would be more expensive than a bridge, and therefore that the action of the governing authorities of the city of Durham was arbitrary, unreasonable, and oppressive," raised no issues of fact to be tried by a jury and "was a question of fact for the court." Later in sub-division 9 of the opinion (117 S. E. 22) the Supreme Court of North Carolina asserts that "nothing in the Interstate Commerce Act or the Transportation Act contravenes the right of the state to invoke the supreme law—an inherent right—to legislate in the interest of public safety."

Here appears the assertion that the police power of the State is not subject to the exercise by Congress of the commerce power. But the police power cannot be exercised arbitrarily. And Congress having under the commerce power in the Transportation Act declared that expenditures for structures shall be reasonable, Congress has thus stated a rule defining reasonableness which the States may not contravene in respect of the structures required of interstate carriers. On the facts appearing in the pleadings the expenditure required is extravagant and wasteful and hence in violation of the Transportation Act.

In several of the amendments added by the Transportation Act to the Interstate Commerce

Act Congress has entered a field in the regulation of interstate carriers and commerce previously left to state regulation. Section 15a of the Commerce Act as to carrier rates is a part of this new plan of regulation. The part of that section which operates in the case at bar is as follows:—

> "(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation." (February 28, 1920.)

Here for the first time the Commission was directed to prescribe a system of rates which would, as nearly as may be, earn an aggregate annual net railway operating income equal to a fair return on the property, and the allowance of these rates was conditioned upon "efficient and economical management and reasonable expenditure for maintenance of way, structures and equipment" by the carrier. Responding

to this new obligation the Interstate Commerce Commission in *Ex Parte* 74, 58 I. C. C. 220, advanced and later, 68 I. C. C. 676, reduced the rates. So we have presented a new situation which did not exist when the Erie case (254 U. S. 394) was under consideration. This situation is new in the essential circumstance that Congress has, in making the rates of the interstate carriers, conditioned the rate system upon efficient and economical management in such matters as this present one. This section of the Statute was foreshadowed in the report of the Committee on Interstate Commerce to the Senate wherein Senator Cummins made the following statement:

> "Heretofore the regulation of transportation has been regarded merely as a restriction imposed upon particular carriers. For the first time it is proposed to look upon transportation as a subject of national concern and from a national standpoint. It is the duty of the Government so to exercise its power of regulating commerce * * * that all parts of a common country shall enjoy adequate transportation facilities at the lowest cost consistent with fairness to the capital invested and to the men who manage and operate these facilities."
>
> (Report No. 304 of Committee on Interstate Commerce to accompany S. 3288 dated Nov. 10, 1919, page 12, (Calendar No. 231) "Government Control of Railroads.")

And a fair return upon the carriers' property as a whole or in rate groups provided for in subdivision 3 of Section 15a is conditioned upon "economical management of existing transportation facilities" which excludes a wasteful expenditure, part capital and part extraordinary operating expense, such as this under-pass.

The recapture provisions (sub-divisions 5 and 6 of Section 15a), the provisions requiring the approval of the Commission for security issues (Section 20a), the accounting provisions (subdivision 5, Section 20) and other provisions of the Interstate Commerce Act present a comprehensive and exclusive plan of financial administration and expenditure by the carriers, the purpose of Congress being, as we shall presently endeavor to show, to furnish and support a nation-wide and adequate system of transportation for the public.

According to the facts stated in the answers, and admitted as true upon this record the underpass structure required by the ordinance would be inefficient and wasteful.

The Supreme Court in the Wisconsin Rate Case (Railroad Commission of Wisconsin *vs.* C. B. & Q. R. Co., 257 U. S. 563) ruled that the Interstate Commerce Commission had power to raise intrastate rates in order to prevent discrimination against interstate commerce and consequent burden upon that commerce. The Court in decid-

ing the case made use of this language which is apposite in principal to the present case (page 585):—

> "It is manifest from this very condensed recital that the act made a new departure. Theretofore the control which Congress through the Interstate Commerce Commission exercised was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered and the abolition of rebates. The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in section 15a to be one of the purposes of the bill."

In Interstate Commerce Commission *vs.* Goodrich Transit Company, 224 U. S. 194, the accounting provisions of the Interstate Commerce Act were under consideration which required the carriers to use a uniform system of bookkeeping and account for all their expenditures and revenues. The question arose whether Congress had

the power to authorize the Interstate Commerce Commission to require accounting of an intrastate activity of the carrier—the expense of conducting an amusement park by one of the Great Lakes Lines. The Court held that Congress had the power to require the whole accounting to be made for the enlightenment of the Interstate Commerce Commission.

And in the New England Divisions Case (A. C. & Y. Ry. *vs.* United States, 261 U. S. 184), the Court reaffirmed from the angle of financing the carrier system of the country the principles announced in the Wisconsin Rate case, *supra,* and pointed out that the Transportation Act introduced a new railroad policy in Federal legislation, namely, "to ensure, * * * adequate transportation service". The Court approved a shift by the Interstate Commerce Commission of divisions between the trunk lines and the New England roads to benefit and support the latter roads financially. The analogy with this case of limiting "to reasonable expenditures for maintenance of way, structures and equipment" (sub-division 2 of Section 15a of the Interstate Commerce Act as amended by the Transportation Act) is apparent.

The Recapture decision is recent: Dayton-Goose Creek Ry. *vs.* I. C. C., Jan. 7, 1924.

So that at this day no serious doubt can be entertained of the power of and exercised by Con-

gress to make this requirement of efficient and economical expenditures by the carriers. As clear at this time is the adequacy of the power of Congress to deal with all the expenditures of the carriers.

In order to maintain an adequate railway service for the public, Congress has authorized reasonable rates and required reasonable expenditure by the carriers for maintenance of way, structures and equipment. The under-pass required by the Durham ordinance is wasteful and inefficient. The ordinance upon the record made by the undenied answers in the case at bar requires unreasonable expenditures inhibited by the Act of Congress.

W. B. GUTHRIE,
THEODORE W. REATH,
Of Counsel for Norfolk and Western Railway Company, Appellant.

FULLER & FULLER,
JAMES F. WRIGHT,
Of Counsel for Seaboard Air Line Railway Company, Appellant.

MANLY, HENDREN & WOMBLE,
L. E. JEFFRIES,
Of Counsel for Southern Railway Company, Appellant.

FEBRUARY, 1924.